ESM and Protection of Fundamental Rights: Towards the End of Impunity?

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Yesterday, the Grand Chamber of the Court of Justice of the European Union (CJEU) issued two important rulings in the cases C-8/15 to C-10/15 (hereafter *Ledra Advertising et al. v European Commission and European Central Bank*) and C-105/15 to C-109/15 (hereafter *Mallis et al. v European Commission and European Central Bank*). They should be of interest to anyone concerned with the preservation of fundamental rights under the new governance framework of the Economic and Monetary Union. These two decisions significantly contribute to lifting the ambiguity around the legal status of the anti-crisis instruments that framework now explicitly provides for – the well-known 'Memoranda of Understanding' (MoU) and the corresponding Economic Adjustment Programs (see Regulation n° 472/2013) –, and their relationship with fundamental rights instruments, most notably the Charter of Fundamental Rights of the European Union ('the Charter'). As it contributes to clarifying and strengthening the legal duties of European institutions when they take part to the provision of financial assistance to a member of the Eurozone in need under the European Stability Mechanism (ESM) framework, the move the Court made yesterday should be warmly welcomed, *a fortiori* because it starkly contrasts with the cautious and timid approach it had so far favoured on these issues (this approach had been deplored in a previous post).

The plaintiffs in these cases are Cypriot nationals that, in the framework of the banking crisis their country went through in 2012-2013, and pursuant to the MoU Cyprus subsequently concluded with the ESM in March 2013, suffered significant financial losses (between 480.000 EUR and 1.600.000 EUR) following the closure of Cyprus Popular Bank and the recapitalization of the Bank of Cyprus. With these proceedings, triggered in May 2013, the plaintiffs sought the annulment of two instruments they deemed illegal : the MoU and a Eurogroup statement concerning the restructuring of the banking sector in Cyprus. The plaintiffs also requested financial compensation under Articles 268 and 340 TFEU (non-contractual liability of the Union) from the institutions to which the adoption of these decisions could in their view be imputed. The General Court dismissed the complaints as inadmissible. On the one hand, it considered that the targeted instruments were not among those it was entitled to annul under Article 263 TFEU, the MoU being an international agreement concluded between the ESM and Cyprus outside the scope of EU law, and the Eurogroup statement lacking any kind of binding force. On the other hand, the institutional actors brought before the Court, namely the European Commission and the European Central Bank (ECB), could reasonably not be considered as the authors of the instruments at stake, despite their strong involvement in the functioning of both the ESM and the Eurogroup.

Appealed before the Court of Justice, these orders were in the first place broadly confirmed by AG's Wahl and Wathelet : the plaintiffs had indeed failed to target the relevant institutional actors and the correct legal acts. In a very constructive way, AG Wathelet moreover suggested an alternative avenue for successful judicial review of the MoU conditionalities imposed by the ESM on States under financial assistance : since the adoption of Regulation n° 472/2013, MoU's and their conditionalities have to be translated into an Economic Adjustment Plan, formally adopted as a Council Implementing Decision (in the case of Cyprus, see Decision n° 2013/463), an EU legal act directly challengeable before the Court (§§92-99).

In *Mallis et al. v European Commission and European Central Bank* , the Court broadly confirmed the orders of the General Court: a statement of the Eurogroup, which remains until now a forum for discussion between ministers of the Member States whose currency is the Euro, cannot be regarded as a measure intended to produce legal effects with respect to third parties, and can therefore not be annulled under Article 263 TFEU (§§ 45-52).

The decision in *Ledra Advertising et al. v European Commission and European Central Bank* is much more groundbreaking, and deserves longer comments. The Court first confirmed its holding in *Pringle* (§ 161): the

Commission and the ECB may well play a siginificant role within the ESM framework (especially with regard to the negotiation and conclusion of the MoU's), this does not alter the fact that they keep on lacking any power to make decisions of their own. As a consequence, ESM acts such as the MoU's cannot be imputed to those institutions, and fall outside EU law. Conditionalities enshrined in a MoU concluded between the ESM and a State party therefore still evade direct annulment by the Court. However, contrary to what the General Court held in its ruling, and in contrast to what AG Wahl suggested in its opinion, such finding does not prevent unlawful conduct to be committed by the Commission or by the ECB when acting under the ESM framework, and to be subsequently found and compensated by the Court under Articles 268 and 340 TFEU. Relying on its holding in *Pringle* (§§ 162-163) and drawing from Article 13(3) of the ESM Treaty and Article 17(1) TEU (according to which the Commission promotes the general interest of the Union and oversees the application of Union law), the Court ruled that the Commission does not have a mere best-efforts obligation (as AG Wahl suggested, §70) when it comes to the compliance of a MoU with EU law (and more specifically, with the Charter), but a true performance obligation in that regard. The Commission, when negotiating and concluding an MoU on behalf of the ESM, should live up to its role of Guardian of the Treaties, and « *refrain from signing a memorandum* […] *whose consistency with EU law* [and with the Charter] *it doubts* » (§ 59). Setting aside the orders of the General Court, the Grand Chamber went on to investigate whether the ESM-Cyprus MoU negotiated and concluded by the Commission, violated the right to property enshrined in Article 17 of the Charter by imposing substantial losses on uninsured depositors. After a (too ?) short analysis, it ultimately found it did not. In its view, the restrictions to the right of property under scrutiny met an objective of general interest, the stability of the banking system of the Euro area (and the prevention of dangerous spill-overs across the Zone), and did not constitute disproportionate and intolerable interferences impairing the very substance of the right to property. Having found no unlawful conduct on the part of the Commission, the Court logically dismissed the action for compensation.

Regardless of whether we agree that the loss of 37,5% of one's uninsured deposits constitutes an acceptable and proportionate restriction to the right to property (personally I do not, but this is a discussion I am not willing to enter here), it remains that the Court's decision should be welcomed by anyone concerned with the preservation of fundamental rights in the framework of the new governance of the Eurozone. As Glinavos has shown in his earlier post, this ruling «*breaks down the barrier between European institutions and international-treaty based structures that have sprang up to deal with the needs of Euro-area crisis response*». The decision moreover sends a strong signal to EU institutions: whether they act in the framework of EU law or at its margins, under the screen of international agreements, the Commission and the ECB should duly take fundamental rights into account, and be ready to be held liable if they fail to do so. When acting as agents of the ESM, the Commission and the ECB no longer operate in legal limbo, under the radar of the Court. Judicial scrutiny can now be triggered. And that is in itself very good news.

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